IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1255 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KOLI GUNABHAI KANDHABHAI

Versus

STATE OF GUJARAT

Appearance:
MR YOGESH S LAKHANI for Petitioners
MR KT DAVE, APP, for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 21/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This criminal appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Amreli, on October 19, 1992, in Sessions Case No.52 of 1987. The appellants came to be convicted by the learned Trial Court for offences punishable under Section 302 read with Sections 147, 148, 149 and 120-B of Indian Penal Code and under Section 326 read with Sections 147, 148, 149 of I.P.C. The appellants were sentenced to undergo rigorous imprisonment for life with a fine of Rs.2000/-. They were directed to undergo a further rigorous imprisonment for a period of one year in event of default in payment of fine for the offence of murder. For the offence of causing grievous hurt, the appellants were sentenced to undergo rigorous imprisonment for a period of five years and to pay a find of Rs.500/-. They were directed to undergo rigorous imprisonment for a period of six months in event of default in payment of fine. Aggrieved by the said judgment and order, the original accused persons have preferred this appeal.

2. The facts leading to the case can be stated, in brief, as under :-

2.1 A First Information Report came to be lodged by one Sidibhai Jesabhai Koli of village Timbi of district Amreli on 9.4.1987 with Police Sub-Inspector, Una, at 22.45 hours. According to the F.I.R., the complainant had three brothers. The eldest was Amro, the next was Bhupat and the next was Lakhman. Lakhman had an affair with Mani, daughter of Koli Kandha Pitha and he had, therefore, married with her about nine months prior to the incident. Kandha Pitha had prosecuted Lakhman therefor. The case was proceeded with at Amreli and, ultimately, Lakhman came to be acquitted. About six months prior to the present incident, Guna Kandha and others had assaulted Bhupat, another brother of the complainant. For that purpose, a complaint was lodged with the Police and the case is pending before the learned Judicial Magistrate, First Class, at Rajula. Some Chapter cases were also going on between the parties before Mamlatdar, at Jafrabad. In those cases, both the sides have been acquitted. After the last incident of Bhupat being beaten, he was working as a tractor driver at village Viktar whereas Lakhman was doing labour work at Timbi.

2.2 According to the complainant, on the day of incident, i.e. on 9.4.1987, at about 8.00 P.M., the complainant along with his brothers Lakhman and Bhupat was going to meet Manu Mala, with whom their sister's son Rana was working. They were going to Manu Mala for

getting some money to meet with the expenditure of betrothel of Rana. While they were passed through the market of village Timbi for going to the house of Manu Mala, when they reached near the Pan Cabin of Jivabhai, Guna Kandha, Vira Kandha, Viza Kandha, Pata Bhana, Babu Bhana and Lala Bhana assaulted them. Guna Kandha and Vira Kandha had dharia with them. Guna Kandha gave a dharia blow on neck of Lakhman, as a result of which he fell down. Vira Kandha gave dharia blow on the hind portion of head of Bhupat, as a result of which he also fell down. The complainant, therefore, tried to intervene and in doing that, Guna Kandha inflicted a dharia blow on his left hand. At that time, Lakhman and Bhupat were being assaulted upon by Guna and Vira. Viza Kandha had an axe with him. Pata Bhana had an iron-T and Babu Bhana and Lala Bhana had sticks with them. They all were inflicting injuries to the brothers of the complainant. The complainant apprehended risk to his life and he, therefore, ran away. Jivabhai Cabinwala and other persons had gathered there but nobody intervened. According to the complainant, he rushed into the cabin of Fula Maharaj and took exit through the rear door after closing the front door from within. The complainant then went to the house of Manu Mala and told him about the incident. The complainant in company of Manu Mala went to the house of Police Constable-Balabhai and informed him about the incident. Balabhai came went with them to the place of incident immediately. There they noticed that Lakhman and Bhupat were lying at the place of incident in a bleeding condition. Some truck was passing by, which was stopped by Balabhai and they took the injured brothers to the hospital in the said truck. By then, the eldest brother-Amra had reached the place. The complainant went to Una hospital. The injured were declared to be dead by the doctor upon examination. This F.I.R. was recorded by P.S.I, Una. It was registered with Una Police Station at zero number as the place of incident fell outside the jurisdiction of Una Police Station and within the jurisdiction of Nageshari Police Station. The said F.I.R. was, therefore, sent to Nageshari and offence came to be registered by Nageshari Police Station. Upon registering of the offence, investigation was initiated. Post-mortem of the dead bodies were got performed, requisite Panchnamas were drawn, accused persons were arrested, statement of eye-witness was recorded and, ultimately, the Investigating Officer having found sufficient evidence against the accused persons, filed charge sheet against the accused before the learned Judicial Magistrate, First Class, at Rajula. Since the case was triable exclusively by Court of Sessions, the learned Judicial Magistrate,

First Class, Rajula, committed the case to the Court of Sessions at Amreli. The case came to be registered as Sessions Case No.52 of 1987.

2.3 Learned Additional Sessions Judge framed the charge against the accused persons at Ex.1, charging the accused persons for the murder of Lakhman Jesa and Bhupat Jesa punishable under Section 302 read with Section 149/34 and Section 120-B of I.P.C. besides offence punishable under Section 148 along with Section 326 read with Section 149 of I.P.C. All the accused persons pleaded not guilty to the charge and expressed their desire to face the trial.

2.4 After considering the evidence led by the prosecution, the learned Additional Sessions Judge came to a conclusion that the prosecution had successfully proved the charges levelled against all the accused persons. The learned Additional Sessions Judge, therefore, convicted and sentenced the accused persons for the offences with which they were charged as stated above. Aggrieved by the said judgment and order, the original accused persons have preferred this appeal challenging the conviction.

3. Learned advocate Mr. Y.S. Lakhani appearing for the appellants, at the outset, submitted that appellant No.3-Viza Kandha Koli has expired.

4. As regards merits of the appeal, Mr. Lakhani submitted that the prosecution has examined only one eye-witness, who is complainant-Sidibhai Jesabhai (Ex.10). Other independent witnesses, though available, have not been examined by the prosecution. He submitted further that absence of these independent witnesses will have a great significance if the evidence led by the prosecution is closely scrutinized. Mr. Lakhani submitted that the prosecution has tried to suppress the genesis of the incident. The original of the incident is tried to be concealed by the prsecution. The evidence, therefore, cannot be accepted.

4.1 Mr. Lakhani contended that there is evidence on record to indicate that either there was no light or the lights had dimmed and, therefore, the witnesses could not have identified the assailants. In order to substantiate his argument, Mr. Lakhani has taken this Court through the deposition of eye-witness Sidi Jesa (Ex.10) and deposition of the Investigating Officer.

4.2 According to Mr. Lakhani, the proseution has

suppressed the incident, its genesis and the sequence of events. He submitted that the evidence indicates that three accused persons had injuries on their person - two of whom had bleeding injuries. These injuries are not explained by the prosecution. The prosecution witness went to the extent of denying the injuries to the accused persons. Mr. Lakhani submitted that there is discrepancy about the place of incident. The version as given by the complainant eye-witness in the F.I.R. as well as his examination-in-chief appears to be quite normal. But when the deposition is subjected to the test of cross-examination, the witness comes out with a different story, which is far from the original story. The story that emerges from cross-examination gets no support from any other evidence. Mr. Lakhani submitted that it has come on record that the complainant had a blood stained stick in his hand which came to recovered by the Police. No explanation is tendered by the prosecution in this regard.

4.3 Mr. Lakhani submitted that, admittedly, the incident occurred near the Pan Cabin of Jivabhai. However, the dead bodies are found on an Ota (Platform). How these two dead bodies travelled from the place of incident to the platform is not brought on record. But evidence does indicate that the two dead bodies were lying on the Ota as if they were made to sleep over there. Mr. Lakhani submitted further that, admittedly, accused-appellants No.4, 5 and 6 were armed with iron-T or sticks. The injuries found on both the deceased persons, if examined, would indicate that all the injuries were possible with a sharp edged weapon except one injury on person on Lakhman which is in form of contuced lacerated wound, which again is simple in nature. Mr. Lakhani submitted that there is nothing on record to indicate the formation of unlawful assembly. Mr. Lakhani submitted that if the investigation papers are seen, initially, it was a case of fight (Mara Mari) whereas the witnesses do not speak of any such fight or quarrel or injuries to th accused persons. Mr. Lakhani, therefore, urged that the prosecution witnesses are not giving the correct account of the incident.

4.4 Mr. Lakhani further submitted that the complainant is the brother of the deceased persons. Admittedly, there is enmity between the complainant and the accused persons and he is the only eye-witness examined by the prosecution. Mr. Lakhani submitted that non-examination of independent witnesses, therefore, may be considered as prejudicial to the accused.

4.5 Mr. Lakhani subsmitted that the prosecution has come with a case of discovery of weapon by the accused persons. This discovery is not proved as required under law. He submitted that even if it was proved, the proocedure followed by the Investigating Agency is not proper and cannot be said to have met with the requirements of Section 27 of the Indian Evidence Act. It has come on record that, although there are separate Panchnamas of discovery, the Panch witness has admitted that no such separate proceedings were undertaken. It is also contended by Mr. Lakhani that one of the Panchas is related to Manu Mala and is a professional Panch. Admittedly, he has stood Panch in number of Panchnamas. Further, the thumb impression on all of the Panchnamas, purporting to be that of Panch-Lumbha Bhura, has not been attested except in one where it has been attested by some unknown person. In one of the Panchnamas, the other Panch-Anvarali Ramzanali has not signed and this Anvarali has not been examined by the prosecution.

4.6 Mr. Lakhani contended that it is the case of the prosecution that weapons were found to be blood stained, clothes of the accused were also blood stained, soil was collected from the place of incident and the clothes of the deceased were also collected, which were blood stained. Although it is the case of the prosecution that all these articles were sent to Forensic Science Laboratory for chemical analysis, the report does not reveal the group of the blood found on any of these articles and, therefore, this lacuna in the prosecution case will not establish the guilt of the accused, as the other evidence is shaky as already indicated. Mr. Lakhani contended that conduct of Police Constable-Bala Shanker is also also worth noting. Although he is a Police Constable who has been informed about the incident, immediately he does not take any action himself nor does he disclose the details to the P.S.I., Una, who records the F.I.R. Mr. Lakhani submitted that the investigation has not been properly done and requisite evidence is not produced on record. All these aspects have been overlooked by the trial Court and the accused persons have been wrongly convicted. Mr. Lakhani submitted that in light of the following pronouncements, the prosecution story ought not to hav.e been accepted by the Trial Court :-

(1) Kasam Abdulla Hafiz,etc. v.State of Maharashtra, 1998 Criminal Law Journal 1422.
(2) Jarnail Singh v. State of Punjab, 1996 Criminal Law Journal 1139.
(3) Jagga Singh v. State of Punjab, A.I.R. 1995 SC

135.

(4) State of Bihar v. Bishwanath Rai & Ors., 1997 (4) Crimes 22 (SC).

(5) Ram Lakhan Singh & Ors. v. State of U.P., (1997) 3 SCC 268.

(6) Ram Kumar & Another v. State of Haryana, A.I.R. 1998 SC 1437.

(7) Nirmal Kumar v. State of U.P., 1992 Criminal Law Journal 1426.

(8) Shahbuddin Abdul Kahlik Shaikh v. State of Gujarat, JT 1995 (3) SC 456.

5. Learned Additinal Public Prosecutor Mr. Dave has opposed this appeal vehemently. His contention is that it is the quality of evidence and not the quantity which is material. There is nothing to disbelieve eye-witness Sidi Jesa. There is nothing which would weaken his evidence. The cross-examination of this witness does not bring out any material which would make his deposition doubtful. According to Mr. Dave, it has to be considered that the witness deposed in the Court after a lapse of five years from the date of incident and, therefore, some discrepancy is bound to creep in. The witness is a rustic villager who was subjected to a through cross-examination by a lawyer and he may have stated certain things unwittingly, not knowing the serious consequence thereof. The Court may, therefore, skip the evidence and accept whatever part of the evidence is found to be worthy in deposition of this witness. Mr. Dave submitted that the version that is given by the witness in his examination-in-chief is supported by his version given in the F.I.R. The F.I.R. was given almost immediately after the incident and, as such, there is no chance of any concoction by this witness. Mr. Dave submitted that the version emerging from the F.I.R. and the examination-in-chief of this witness gets corroborated by medical evidence and, therefore, this witness may be believed.

5.1 According to Mr. Dave, non-examinations of other eye-witnesses may not be considered as fatal to the prosecution case. Mr. Dave submitted that the prosecutor has to use his discretion and has to decide which witness to examine. It is quite likely that other witnesses may not be supporting the prosecution case and, therefore, non-examination of other independent witnesses may not be considered as fatal to the prsecution case. In support of his submission, Mr. Dave has relied on decision in the case of Ram Sunder Yadav and Others v. State of Bihar, 1998 SCC (Cri) 1630 and Hukum Singh and Others v. State of Rajasthan, 2000 SCC (Cri) 1416.

5.2 As regards want of sufficient light at the time of the incident and consequent possible error in identification of assailants canvassed by Mr. Lakhani, Mr. Dave contended that the accused party was known to the complainant's side and there is evidence to indicate that the shops were open and there was light. May be the light was dim, but in light of the fact that parties are known to each other, that light can be considered as sufficient, unless indicated otherwise. Mr. Dave submitted further that non-mentioning of the existence of dim light or petromax in the F.I.R. may not be adversely viewed. The F.I.R. is not supposed to give a detailed account of all the relevant facts relating to the incident. It is aimed at disclosing the incident broadly, so as to set the investigating machinery in motion and, therefore, this omission cannot be considered as material omission and may not be viewed adversely. Mr. Dave relied on the decision of the Apex Court in the case of Nathuni Yadav and Others v. State of Bihar and Another, 1998 SCC (Cri) 992, wherein an incident had occurred on a moonless night, but still identification by eye-witness was accepted by the Apex Court. Mr. Dave submitted that the evidence led by the prosecution is clear and cogent. The presence of eye-witness is natural. His conduct is natural. He has immediately informed witness as well as police witness after the incident and has deposed before the Court consistently. There was no scope for any concoction on his part while lodging the F.I.R. Under the circumstances, contradictions appearing in his deposition may be considered as natural and non-injurious to the prosecution case. He, therefore, urged that the appeal may be dismissed.

6. Both the sides have taken us through the evidence on record. We have also examined the record and proceedings in order to appreciate the contentions raised by both the sides.

7. After thoughtful consideration, what emerges is that the prosecution case hangs mainly on deposition of a solitary eye-witness. Some contradictions have come in his deposition during cross-examination. According to the appellants, these contradictions along with other defects in the prosecution case would go to the root of the case and benefit must go to the accused-appellants. According to the respondent-State, the contradictions found in deposition of the eye-witness are minor. They have to be viewed in light of the fact that his deposition is recorded after a lapse of about five years

and even minor contradictions deserve to be ignored. The Court, therefore, has to address a question as to whether contradictions emerging in deposition of the eye-witness are minor and insignificant or whether they are relevant, major and important. The Court has then to consider the effect of these contradictions on the prosecution case.

8. In this regard, it has to be noted at the outset that, as per the prosecution case, when the incident occurred, the shops around the place of incident were open. The Pan shop, near which the incident occurred was also open. The prosecution has examined witness-Sidi Jesa as eye-witness. Sidi Jesa happens to be brother of both the deceased persons and the complainant. The prosecution has then examined witness-Lakhabhai Bavbhai as eye-witness. He has, however, not supported the prosecution case and was, therefore, declared hostile. The result is that that prosecution case depends only on deposition of a solitary eye-witness Sidi Jesa. Mr. Lakhani, in support of his argument that non-examination of other independent eye-witnesses may be considered as fatal to the prosecution case, has relied upon the decision of the Apex Court in the case of Ram Lakhan Singh and Others v. State of U.P., (1997) 3 SCC 268 and Ram Kumar and Another v. State of Haryana, AIR 1998 SC 1437. Against this, we may take into consideration a decision rendered by the Apex Court in Hukamsing & Ors. v. State of Rajasthan reported in 2000 SCC (Criminal) 1416. What emerges from the pronouncements of the Apex Court is that mere non-examination of other independent witnesses may not be considered as fatal to the prosecution case. But the Court may closely examine the evidence of the eye-witness on whose deposition the prosecution relies before acting upon it. No principle can be laid down that non-examination of other available witnesses would be fatal to the prosecution case. It cannot be ignored that people at large are many a times reluctant to extend their co-operation to the law enforcing machinery and, therefore, the contention of Mr. Lakhani that non-examination of other available witnesses may be considered as fatal to the prosecution case cannot be accepted. However, absence of other independent evidence would definitely call for a close scrutiny of evidence of the solitary eye-witness before it is accepted. It has to be noted in the instant case that the prosecution while dropping the witnesses has categorically stated in the Purshis that other witnesses are not likely to support the prosecution case and, therefore also, in light of the Apex Court's decision in Hukamsing and others (supra), this Court does not consider non-examination of other eye-witnesses as fatal

to the prosecution. The Court has to examine whether the evidence, after close scrutiny, is found to be cogent, reliable and trust-worthy.

9. Another contention is regarding the veracity of evidence led by the prosecution particularly deposition of eye-witness Sidi Jesa. It has, therefore, to be seen as to what would be the effect of contradictions that have emerged in deposition of this sole eye-witness.

9.1 When a contradiction is brought in evidence of a witness while accepting or rejecting such evidence, the Court is required to consider whether the contradiction is apparent or real; whether it is insignificant or material; and whether it is explainable or irreconcilable. The answers to these factors will decide whether to accept or to reject the evidence of the witness.

9.2 Now, if the evidence of Sidi Jesa, P.W.1 (Ex.10) is examined, after initially giving the details about his relationship with the deceased and the accused persons, he states that the incident occurred on April 9, 1987 at about 8.00 P.M. That was a Thursday. He, along with his brothers Bhupat and Lakhman, was going towards village Timbi. They stay at village Nani Timbi and were going towards village Moti Timbi. They were going to the house of Manubhai Malabhai where their nephew Ranabhai Devabhai was serving. They were going to Manubhai Malabhai for taking money to meet with the expenditure of betrothal of Ranabhai. When they reached near the house of Raghav Kala, all the accused persons were found coming on the road leading to Moli. Accused Guna Kandha and Vira Kandha had dharia with them. Viza Kandha had an axe, Patha Bhana had an iron T and accused Babu and Lala had sticks with them. Guna Kandha gave a dharia blow on neck of Lakhman, as a result of which Lakhman fell down. Viza Kandha gave a dharia blow on the hind portion of the head of Bhupat. Bhupat also, therefore, fell down. Thereafter, all the accused persons surrounded both the brothers and assaulted them with their respective weapons indiscriminately. When this witness tried to rescue, accused No.1 gave a dharia blow on palm of his left hand. He, therefore, ran away from the place to save his life. The witness further states that all the shops around the place of incident were open. The shops remain open upto 12.00 midnight. The shopkeepers also kept petromax. All the shops were open and had their petromax on. The witness ran to the cabin Bavaji Gula Maharaj. After entering the shop, he closed the doors from inside and escaped through the rear door. The cabin is at a

distance of about 30 to 35 feet from the place of incident. Therefrom, he went to the house of Manu Mala and informed him about the incident. He categorically stated that his two brothers have been done to death by accused Guna Kandha, Vira Kandha, Viza Kandha, Patha Bhana, Lalabhai and Babubhai with dharia, axe, iron-T and sticks. He requested him to accompany him to the Police Station. Thereafter, the witness along with Manubhai and Bhalabhai went to the place of incident. A truck was passing thereby, which was stopped by the police and both his brothers were dumped into the truck and taken to the hospital at Una. The doctor at Una hospital, after examining, declared both the brothers dead. While they were sitting there, at about 11.00 P.M. the P.S.I. of Una came to the hospital, to whom the F.I.R. (Ex.11) was given. He then identified the weapons.

10. In his cross-examination, he states that the house of accused No.1, 2 and 3 is at a distance of about 500 feet from the place of incident. He states that he had informed Manubhai Malabhai that they were going to see him for money. He also admits that nobody was informed about their going to Manubhai at that point of time.

10.1 Coming to the incident, he states that electricity is available in village Timbi. He also admits that at the time of the incident, the lights had gone dim. He denies that he had not stated in his F.I.R. about petromax. He denies that he could not identify the assailants due to darkness.

10.2 He states that neither he nor any of the deceased brothers caused any injury to the accused persons. He states that he had not noticed any injury on person of any of the accused persons. He states that he was not aware, if accused No.4 was bleeding from his head. He had not noticed any injury on head of accused No.1.

10.3 Coming to the place of incident, he states that Lakhman had stopped near the cabin of Jivabhai for buying beedi. At that time, accused No.1 gave the first blow. At that time Jiva was present in the cabin. Lakhman was standing at a distance of about 1 foot from the cabin. The witness was at a distance of about 20 to 25 feet from Lakhman. Accused No.1 gave the blow from front. Lakhman fell down near the house of Raghavbhai, which is very near to the cabin of Jivabhai. The Ota on which the dead bodies were found is at a distance of 2 feet from the cabin. He denies that the said Ota is at a distance of 20 feet from the cabin. He initially states that three

persons assaulted Lakhman and three were standing near the cabin. He, then, changes his version and says that all the six persons had assaulted Lakhman. They cordened Lakhman and started assaulting him indiscriminately for about five minutes.

10.4 As regards Bhupat, he states that he was standing at a distance of about 20 to 25 feet near Navrang Hotel. Accused No.2 gave the first blow. At that time, Bhupat was at a distance of about 20 to 25 feet towards the south of Jivabhai's cabin. There is a road adjacent to the cabin of Jivabhai where Navrang Hotel is situated. When assaulted upon, Bhupat was at a distance of about 2 feet from Navrang Hotel. Accused No.2 gave a blow from behind. As a result, Bhupat fell down. He then says that Bhupat fell on Lakhman when Bhupat was assaulted upon. He says that blood had fallen on the ground. Likewise, there was blood on the ground near Jivabhai's cabin. The assault on Bhupat also lasted for 4 to 5 minutes. There is further cross-examination on other aspects.

11. What emerges from this evidence of solitary eye-witness is that, according to this witness, deceased-Lakhman was assaulted upon while he was buying beedi from Jivabhai's cabin. Upon receiving the very first injury, he fell down on the ground and he did bleed. The blood had fallen on the ground. This very witness says that deceased Bhupat was assaulted upon when he was near Navrang Hotel and upon receiving injury, he also fell on the ground and bled heavily. The blood had fallen on the ground. He admits that Jivabhai's cabin and Navrang Hotel are situated at a distance of about 20 to 30 feet and that there is a road in between. Against this, if the Panchnama of the place of offence (Ex.21) and the map of scene of offence (Ex.30) are seen, it is clear that the topography as described by this witness is correct, but the situation that should have appeared in the Panchnama, if description of the incident is accepted, is not found. In the first instance, it requires to be noted that the blood stains are not found either near cabin of Jivabhai or near Navrang Hotel where, according to this witness, deceased-Lakhman and Bhupat fell down, respectively, after sustaining bleeding injuries. The blood stains were found on Ota of house of Raghav Kala and the land adjacent to the house. The blood spots were found on Ota of the shop of Amirali where blood spots were subsequently found when the Inquest was made. This contradiction between the deposition of the eye-witness and the Panchnama of place of offence is not explained by the prosecution in its

evidence. An attempt is made by learned Additional Public Prosecutor, Mr. Dave, to explain this situation by stating that the deposition was recorded after a long lapse of time and witness may have, therefore, committed some mistake. This contention of Mr. Dave cannot be accepted for the reason that if the deposition of this witness is examined, it is apparent that the witness is able to give all minute details regarding day, date, time and the topography of the place of incident including distances. Therefore, the deposition of this eye-witness gets no corroboration from the circumstantial pieces of evidence, namely, blood stains at the place of incidence. The distance between Jivabhai's cabin and Raghav Kala's house is about 12 feet. Admittedly, Lakhman was assaulted upon while he was buying beedi and was about a distance of 1 foot from the cabin; admittedly, he immediately fell down on receiving the first injury on his head; and, admittedly, the blood did fall on the ground. No blood stains are found around the cabin of Jivabhai. Likewise, no blood stains are found near Navrang restaurant where, admittedly, Bhupat was assaulted upon when he was at about 2 feet from Navrang restaurant. He did bleed, fell on the floor and blood did fell on the ground. It, therefore, becomes doubtful whether this witness really could have witnessed the incident or whether this witness is really telling the truth, if at all he has seen the occurrence.

12. It requires to be noted that this witness categorically denies of having caused any injury to any of the accused persons. He even denies to have noticed any bleeding injury on person of accused No.4 whereas there is evidence on record to indicate that accused No.4 had profusely bleeding injuries. Ex.34 is the arrest Panchnama of accused Pata Bhana. There was a bleeding injury above his left ear on his head caused with a sharp cutting instrument. It has been noted in the Panchnama that the left side of the collar, left pocket and the button strip of the shirt was stained with a streak of blood, so also his underwear (Baniyan). The streak of blood ran right upto the waistband of his Pyjama. There were other blood stains on the Pyjama as well as shirt. Likewise, the arrest Panchnama of accused No.1-Guna Kandha (Ex.37) indicates that he also had a wound above his forehead wherefrom he had bled. That wound was covered with a cloth and that cloth was blood stained. This accused had certain other injuries on his person as well. Witness-Sidi Jesa does not disclose or does not explain as to how these injuries were caused to the accused persons. He simply denies of having seen such injuries on person of any of the accused.

13. The deposition of the Investigating Officer indicates that it was revealed during the course of investigation that muddamal article No.4 (stick) was of the ownership of the complainant. It was also found that the said stick had fresh blood stains. He also admits that he had noticed injuries on person of accused No.1 and 4 and had sent them for medical treatment. It has also come on record that in respect of this very incident, a cross-complaint was made and case was instituted. What has happened to that case is not known to the Investigating Officer. Be that as it may, but one fact surely emerges that out this very incident, another case has been instituted against the complainant party. Nothing has come on record of this case as to what were the charges and what happened in that case. What is more important is that the eye-witness Sidi Jesa pleads total ignorance about any such incident. He simply states that the accused persons came and assaulted his two brothers which resulted into death. He does not speak of any resistance or counter attack or scuffle which may have resulted into injury to the accused persons. This sharply reflects that the witness has either not seen the incident occurring or that he is not correctly stating the manner in which the incident occurred. In the instant case, it is evident that the injuries sustained by accused Nos.1 and 4 were not of such a nature which may not have been noticed by an ordinary person. Accused No.4 had such a bleeding injury that there was a broad strip of blood stain on front of his shirt and his undergarment. Likewise, accused No.1 also had a bleeding injury just above his forehead and, therefore, in our opinion, this witness is not giving the correct version about the manner in which the incident started and occurred. He is not giving correct details of sequence of events which may have occurred. This factor has a bearing on veracity of evidence of this sole eye-witness on whose testimony the prosecution case hangs.

14. It is true that non-exaplanation of injury by the prosecution is not always fatal to the prosecution case, but non-explanation of such injuries would assume greater importance where the evidence consists of interested and inimical witnesses. In the instant case, admittedly, the complainant and the accused party were on inimical terms. The complainant is the brother of the deceased persons and, therefore, his non-explanation of such apparent injuries on person of two of the accused would assume greater importance. In Vijayee Singh and Others v. State of U.P., (1990) 3 SCC 190, the Apex Court observed that non-explanation of injury is not fatal in all cases.

If the evidence is clear, cogent and creditworthy, such non-explanation may not form the basis for rejecting the prosecution evidence and consequently the case. But if the non-explanation of such injury forms part of deposition of an interested or an inimical witness, it would assume greater importance. The Court has to be careful before accepting a case of murder against accused persons. The Court would be justified in demanding full evidence against the accused to prove the offence before it subjects the accused to lethal punishment under Section 302, I.P.C. (AIR 1995 SC 135).

15. In the instant case, as discussed above, the prosecution case hangs on solitary deposition of Sidi Jesa. His deposition, as discussed above, suffers from contradictions on vital aspect, namely, the place of incident. His version regarding place of incident does not get corroboration from other circumstantial evidence. The deposition also suffers from the defect of non-explanation of injuries on part of the accused persons. The picture that emerges is that this witness is not giving the correct account of the manner in which the incident had occurred. He tries to suppress the genesis of the incident and other vital factors which may go adverse to the prosecution case, namely, injury on person of the accused. He does not disclose how the accused party sustained injuries. In State of Bihar & Ors. v. Bishwanath Rai & Ors., 1997(4) Crimes 22, the Apex Court observed that non-giving of correct account of incident is fatal to the prosecution. In that case, it was found that the evidence of the eye-witness did not get corroboration from medical evidence. It was found that the eye-witnesses had suppressed the real manner in which the incident took place as they failed to explain how a serious injury was received by one of the accused persons. The Apex court, therefore, confirmed the view of the High Court acquitting the accused persons on this account. In our view, the contradictions in deposition of sole eye-witness examined by the prosecution go to the root of the incident and the prosecution case. They cannot be considered as minor as are sought to be dubbed the learned Additional Public Prosecutor.

16. Apart from the above fatal defect in the prosecution case, we noticed certain other material defects in the prosecution case which would render the prosecution case as unacceptable. The first and foremost is that, although blood samples were taken from the spot, blood stained clothes and weapons were seized and were sent to the Forensic Science Laboratory for Chemical analysis, there is no report of the Chemical Analyser to

indicate as to what were the blood groups of the blood found on all these articles. The oral testimony of the witness about identification of the weapon, about the place of incident and wherefrom the blood sample was taken would be unacceptable.

16.1 The discovery of weapon by drawing various Panchnamas as contemplated under Section 27 of the Evidence Act produced at Ex.35, 36. 38 and 40 suffers from vital defects. These Panchnamas were drawn in presence of Panch-Lumbhabhai Bhurabhai and Anvarali Ramzanali. Anvarali Ramzanali has not been examined. The deposition of Lumbhabhai Bhurabhai (Ex.33) indicates that he has been often called as Panch witness. Apart from that, his deposition also reveals that discovery was not made in the manner in which the Panchnamas were drawn. It is also admitted by him that all Panchnamas were drawn at the Police Station. Apart from this, the thumb impressions of this witness on all Panchnamas is not identified by any witness. All these defects render the Panchnama unacceptable.

16.2 It is also worthwhile to note that the prosecution has not been able to bring on record as to how and by whom the dead bodies were shifted from the place of incident to the Ota whereafter, they were taken to the hospital.

16.3 No blood stains are found at the places where the deceased persons were attacked and fell on the ground with bleeding injuries. No attempt is made by the prosecution even to explain this situation except that there may be mistake on part of the witness due to lapse of time. The explanation is not acceptable as discussed above.

16.4 No attempt is made to explain the presence of blood on the stick which is of the complainant, particularly, when the witness does not even speak of any quarrel or fight or even a scuffle between the complainant and the accused. This enhances the impact of non-explanation of injuries found on person of accused Nos.1 and 4. The witness goes to the length of denying to have noticed such conspicuous injuries.

17. In view of the above discussion, we are of a view that there is merit in the appeal and the appeal deserves to be allowed. It is very risky to confirm the conviction on sole deposition of an eye-witness whose deposition suffers from various defects and is found to be not trustworthy. We, therefore, quash and set aside

the judgment rendered by the learned Additional Sessions Judge, Amreli, on the 19th October, 1992, in Sessions Case No.52 of 1987 and acquit appellants No.1, 2, 4, 5 and 6 of the offences for which they have been convicted. They be set at liberty forthwith, if not required in any other case.

26. The appeal of appellant No.3-Koli Viza Kandha would abate as he expired pending the appeal. Muddamal to be disposed of as directed by the Trial Court.

[MS. R.M. DOSHIT, J.]

[A.L. DAVE, J.]

gt